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# PALM TREE JUSTICE? THE ROLE OF COMPARATIVE LAW IN THE SOUTH PACIFIC

SUE FARRAN\*

## I. INTRODUCTION

The practical benefits of comparative law or comparative legal method have long been advocated and continue to be of contemporary relevance, especially in the context of law reform and legal development.<sup>1</sup> There are, however, circumstances in which comparative law should be used with circumspection.<sup>2</sup> In particular, where developed legal systems interact with legal systems which are perceived to be 'less developed',<sup>3</sup> or where there is an 'inequality of arms' among those involved in law reform, the comparativist should tread with care so as to avoid, for example, becoming a legal imperialist seeking to impose a perceived superior set of rules on others.<sup>4</sup> The sometimes indiscriminate trade in legal ideas, templates and institutions in a climate of increasing internationalization of law presents challenges for the prudent use of comparative law as a tool of law reform, and an opportunity to reappraise this use.<sup>5</sup>

To explore some of these concerns this article turns away from the Eurocentric character of many comparative law studies, and focuses instead on a region often overlooked by comparativists: the independent island states of the South Pacific, notably Fiji Islands, Tonga, Samoa and Vanuatu, where, it is suggested, some of the challenges confronting the contemporary comparativist are strikingly evident. These island states have plural legal systems which, while they share some common ancestors, operate in very different social, economic and cultural environments. It is a region where comparative legal method is encountered at a number of levels and on a daily basis, sometimes being used deliberately, sometimes seemingly unconsciously. The region is also one where there is considerable scope for law reform due to the rapid changes taking place and the undeveloped or underdeveloped status of most Pacific island countries. It is also a region where there are very limited resources for law reform and frequent opportunity for intervention by other powers.

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<sup>1</sup> R David and J Brierley, *Major Legal Systems in the World Today* (2nd edn, Stevens, London, 1978) 4 and T Weir (tr), K Zweigert and H Kötz, *An Introduction to Comparative Law* (2nd edn OUP, Oxford, 1987) 15.

<sup>2</sup> See for example concerns expressed by A Watson, 'Legal Transplants and European Private Law' Vol 4.4. Electronic Journal of Comparative Law, December 2000 <http://www.ejcl.org/ejcl/44/44-2.html> accessed 7 October 2004.

<sup>3</sup> From a 'Western' perspective.

<sup>4</sup> Comparative law itself reveals such tendencies, see for example, the use of the common law case-law method to teach civil law in R Schelsinger *Comparative Law Cases and Materials* (1950)—criticised by A Sereni, 'On Teaching Comparative Law' (1951) 64 *Harvard Law Review* 770, and comments by T Bingham, 'There is a World Elsewhere: The Changing Perspectives of English Law' (1992) 41 *ICLQ* 513, 514.

<sup>5</sup> David, and Brierley (n 1) 531.

The topic chosen to illustrate the theme is one from family law: the allocation of matrimonial property on divorce and the role of comparative law in judicial lawmaking. When considering whether, and to what extent, regional judges adopt a comparative approach, the article first looks at three cases drawn from Tonga, Samoa and Vanuatu. In doing so the article considers whether judicial law-making provides a means whereby legal systems may be harmonized through the emergence of a regional jurisprudence, or encouraged to observe international norms or whether instead, this process of law reform—which lacks democratic scrutiny and operates on an ad hoc basis often divorced from the wider context of the law—undermines the integrity of the comparative legal method which should therefore, be the preserve of the legislature. With this in mind the article then considers an example of legislative reform in Fiji, and the role and possible consequences of comparative law in that process. It concludes by reflecting on what can be learned from these island case studies for the teaching and practice of comparative law.

## II. THE JURISDICTIONS UNDER CONSIDERATION

Many of the island countries of the South Pacific region have long been a rich source of anthropological research. They are also, however, of interest to the legal researcher. Prior to contact with western traders and missionaries societies were governed by custom and customary law. Indeed so alien were their legal systems that some countries and people were deemed to have no recognizable system of civilised law.<sup>6</sup> As most of these countries came under colonial control—of France, Britain, Germany and later Japan—other laws were introduced, sometimes for the population at large, sometimes for non-indigenous, colonial settlers, sometimes distinctly for indigenous people only. At the time such laws were imposed rather than chosen. Customary law remained relevant although it was subject to modification as a result of missionary influences and colonial administration. In some parts of the region the introduced law was the common law, elsewhere it was civil law. In the New Hebrides—now Vanuatu—it was both, as a consequence of Anglo-French condominium rule.<sup>7</sup>

When Pacific Island countries gained independence in the latter part of the 20th century some colonial laws were abolished, others were retained as interim measures pending their replacement by national laws. The place of custom and customary law was reassessed and in some cases strengthened as part of the assertion of independence and national identity, a process which has continued. In some cases, foreign laws have been introduced or have served as a model for national laws. Elsewhere colonial or imperial laws remain unaltered. In addition participation in the family of nations by Pacific Island countries has seen the introduction of international law into domestic law.<sup>8</sup> Today it would be difficult to claim that the law of Pacific Island states neatly fitted into any one of the major legal families of the world.

<sup>6</sup> See *Wi Parata v Bishop of Wellington* 3 NZ. Jur (N.S.) SC 72 in which the Supreme Court held that there was no customary law of the Maoris at the time of the advent of Europeans of which Courts could take cognizance. This state of affairs was contrasted with that of Samoa in the case of *Samoan Public Trustee v Collins* [1961] WSNZCA 1.

<sup>7</sup> Effective between 1914 and 1980.

<sup>8</sup> Significant for Family Law has been the Convention on the Rights of the Child (CRC) and the Convention for the Elimination of Discrimination Against Women (CEDAW).

These various legal influences are all important for family law. At the same time, the development of Pacific island societies, changes in social organization, economic activity, individual expectations and greater contact with ideas and perspectives from outside the region combine to exert new demands on how such laws should operate and what subjects they should cover.

The Pacific is a region where most law reform, while often necessary, is driven by the need to comply with external as much as internal demand. Resources to undertake such law reform are limited and therefore Pacific island states tend to rely on consultants, draftspersons and advisors brought in from other jurisdictions and funded by foreign aid. As legislative law reform is a slow and expensive process, often thwarted by changes in Pacific island governments or policy priorities—of national governments and aid donors—piecemeal law reform frequently falls to the courts, particularly in the area of private law. Here there is often a comparative influence at work at a number of levels.

First, it is not unusual for judges, especially at appeal level, to be seconded from other jurisdictions—from Australia, New Zealand, England, the United States of America as well as other Pacific Island States. Pacific Island countries are too small to have permanent courts of appeal. Sometimes the use of comparative legal reasoning by such judges will be open and transparent. At other times it is simply the baggage of their own legal background which they bring with them and which influences their judgments.

Secondly, even if judges, and the lawyers who appear before them, are indigenous Pacific islanders, they may have received their legal training outside the region, for example in Hawaii, New Zealand, France or elsewhere. This too will influence their legal perspective and preference. It is also the case that in countries where much personal law, especially family law, is governed by custom these lawyers may be unfamiliar with the customary law and lack the ability to argue it before the court.

Thirdly, where legal professionals have received their legal education in the South Pacific,<sup>9</sup> they will be more familiar with the jurisdictions of several Pacific island countries and may present comparative approaches in legal arguments before the courts of their own countries.<sup>10</sup> However, although the judicial decisions of other Pacific Island courts are increasingly accessible to the legal profession throughout the region, due to the establishment of a Pacific Legal Information Institute,<sup>11</sup> a regional jurisprudence is slow to emerge, perhaps because, although there is a shared colonial history among these islands, each has a unique and individual culture and language shaping the context in which the law functions. Indeed the countries of the Pacific region are as diverse as those of Europe if not more so.

<sup>9</sup> The University of the South Pacific which serves the Pacific Island States of the region has offered a four year LLB for a number of years now as well as a Certificate in Law. The Law School is based in Vanuatu but there is also a large distance learning programme.

<sup>10</sup> With students from at least twelve different countries (Cook Islands, Fiji, Kiribati, Marshall Islands, Niue, Nauru, Samoa, Solomon Islands, Tokelau, Tuvalu, Tonga, Vanuatu, and non-members: Federated States of Micronesia and Palau, a comparative approach to legal study at the University of the South Pacific is pervasive.

<sup>11</sup> Based in Vanuatu this publishes on the internet under [www.pacilii.org](http://www.pacilii.org).

## III. MATRIMONIAL PROPERTY

The circumstances of matrimonial property disputes are reasonably similar in any legal system. Parties to a marriage having accumulated various assets—and possibly debts—over the course of a marriage now wish to terminate the marriage/relationship and take with them the share of accumulated assets to which they or the court or arbitrator considers them to be entitled. The evolution of rules to determine matrimonial property issues has however been fairly slow due to a combination of factors, for example, the uneasy relationship between property law and family law; the unequal acquisitive power of men and women; the criteria by which contributions to acquisition or to the marriage are valued; and the traditional perceptions of the relationship between a husband and wife in respect of the matrimonial home.

Where societies remain strongly patriarchal, where certain property, including land, cannot be freely alienated, and where there are a number of different rules governing property interests, the issue is inevitably complicated. In countries experiencing rapid development and a shift from subsistence economies to monetary ones as well as social change affecting individuals within families there are further considerations. Such are the countries of the Pacific region. Property in dispute may include the family home, savings, moveable property such as vehicles and furniture, business enterprises and shares in those.<sup>12</sup>

## A. The Law

While in the country of origin most family legislation has been reformed to reflect changes in society and particularly within the family, in the Pacific the legacy of colonial laws from the 1970s and earlier remains. In some instances this law has been amended or modified. For example, the Matrimonial Causes Act of Vanuatu (1986) has been held to be modelled on the 1950 or 1965 Matrimonial Causes Act (UK).<sup>13</sup> Similarly, in Fiji it has been held that sections of the Matrimonial Causes Act (Cap 51) bear close affinity to the Matrimonial Causes Act (UK) 1973 and to the statutory provision obtaining in New Zealand and the Australian Matrimonial Causes Act 1949 from which the Fiji Act derives.<sup>14</sup> Elsewhere imperial law still applies unmodified. For example, in Kiribati and Solomon Islands, the Matrimonial Causes Act 1950 (UK) regulates divorce between non-Kiribati and non-Solomon Islanders respectively. Even where countries were not colonies, as in the case of Tonga,<sup>15</sup> the law is modelled on the common law of the early to mid-20th century.<sup>16</sup>

Not only was legislation introduced into the region, either wholly or in part,<sup>17</sup> but the principles of common law and equity were also included in the legal systems and

<sup>12</sup> See for example, *Cheffers v Cheffers* [1993] HBSC 2, *Koroiwaca v Bakosa* [2004] FJHC 207.

<sup>13</sup> *Banga v Waiwo* [1996] VUSC 5.

<sup>14</sup> *Devi v Singh* [1985] FJCA 2. Now replaced by the Family Law Act 2003.

<sup>15</sup> Tonga became a British protectorate in 1900, but remained a constitutional monarchy.

<sup>16</sup> See, for example, Divorce Act (Cap 29) 1927 Tonga, Divorce and Matrimonial Causes Act 1961 Samoa.

<sup>17</sup> For a comprehensive overview see J Corrin Care, 'Colonial Legacies?' A study of received and adopted legislations applying in the University of the South Pacific Region (1997) 21 The Journal of Pacific Studies 33.

remain part of the interim or transitional legal system provided for in the national constitutions which came into effect at independence. These principles apply where there is no national provision or no colonial law of general application, taking into account the circumstances and context of independent states. A typical provision can be found in the Constitution of Vanuatu which stipulates that at independence the applicable law was all:

... Joint Regulations and subsidiary legislation made under the joint regulations which was in force immediately before independence, and British and French laws in force or applied in Vanuatu immediately before independence, which continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.<sup>18</sup>

Alongside these introduced rules and laws, customary law has survived and continues to regulate much of family life. Indeed, at independence the place of customary law in the hierarchy of laws was in some countries emphasised—see for example, Tuvalu, Solomon Islands and Vanuatu.

However, despite the plurality of laws in these jurisdictions there are gaps. The determination of matrimonial property rights is one such gap as revealed by the case law of the courts in a number of countries of the region, notably, Samoa, Tonga and Vanuatu. In these countries the legislation does not make provision for the division of matrimonial property. For example, in Vanuatu the Matrimonial Causes Act (Cap 192) gives the court jurisdiction to consider property issues in the context of making awards of maintenance or alimony but not independently of these.<sup>19</sup> In Samoa, the Divorce and Matrimonial Causes Ordinance 1961 indicates the grounds for divorce and makes provision regarding maintenance and alimony, but is silent regarding the division of matrimonial property. In Tonga the Divorce Act (Cap 29) provides no guidance to the court as regards matrimonial property. The Civil Law Act 1966 (Cap 25) used to enable the Court in Tonga to apply ‘statutes of general application in force in England’, however deletion of these words by virtue of the Civil Law (Amendment) Act No 9 2003, removes this possibility. What happens in such cases? Either the court must take a pro-active role and seek to come up with a legal solution, possibly by adopting a comparative method, or it refuses to act, noting the lack of law and hoping that the legislature will remedy the situation.

### *B. Some Cases*

An illustration of the non-interventionist approach can be found in the Tongan case of *Halapua v Tonga* [2004] TOCA 5. Here the Court of Appeal recognised that ‘there is now no matrimonial property legislation in the Kingdom (of Tonga)’ and that ‘(W)ithout any such provisions there remains the distinct possibility that one party to the marriage, usually the wife, may be unfairly disadvantaged’. Sheltering behind the Civil Law (Amendment) Act 2003, the court held that it could make no order regarding

<sup>18</sup> Article 95 Constitution of the Republic of Vanuatu 1980. See similarly section 5 Solomon Islands Constitution 1978, Section 3 Article XV Constitution of the Republic of Palau and Part XI of the Constitution of Nauru.

<sup>19</sup> As applied in the cases of *Molu v Molu* [1998] VUSC 15 and in *Kong v Kong* [2000] VUCA 8.

the matrimonial property, recommending instead that 'the legislature should consider whether there should be legislative provisions relating to the division of matrimonial property on the breakdown of marriage'.<sup>20</sup> In fact the court could have been more creative. Although the Civil Law (Amendment) Act does remove recourse to English statutes of general application, it does not remove the power of the court to apply the 'common law of England and the rules of equity' where there is no other provision made under any other Act or Ordinance in force in the Kingdom (of Tonga).<sup>21</sup> Failure to take the initiative in this way meant considerable hardship in this case as the wife—who was in any case opposing the divorce—lost any status she might have had in Tongan property law to inherit the use of her husband's land should he pre-decease her.<sup>22</sup> As a divorcee not only would she face social ostracism in a strongly Christian community but she would be landless and therefore dependent on the goodwill of friends and family. This case suggests therefore that failure to adopt a comparative approach and look at how equity might intervene in such cases elsewhere had adverse consequences—at least for the wife. Conversely it may demonstrate that the rejection of the colonial legacy by the legislature is re-enforced by the refusal of the court to resort to consideration of common law principles.

By contrast, a more robust approach was taken in the Samoan case of *Elisara v Elisara* [1994] WSCC 14, where there was similarly a lack of legislative or judicial guidance on how to deal with matrimonial property disputes. A further difficulty recognised by the court was that most other common law countries had addressed this question through legislation, thereby removing the need to look to the general principles of common law and equity. Undaunted, the court looked to the application of these principles in cases dealing with property disputes between unmarried couples in other jurisdictions. In particular it considered the use of the constructive trust in such situations and the different elements emphasised by the different jurisdictional approaches to this equitable device. The court considered the following: the reasonable expectation test, developed and advocated in New Zealand;<sup>23</sup> the unconscionable conduct test favoured in Australia;<sup>24</sup> the unjust enrichment test advocated in Canada;<sup>25</sup> the principles of estoppel which have found some favour in England and other common law jurisdictions;<sup>26</sup> and the test of common intention combined with detriment favoured in leading English cases.<sup>27</sup> Faced with a choice of common law precedents, the Samoan Supreme Court elected to follow a combined test of unjust enrichment and reasonable expectation, on the grounds that the first had been applied in Canada to property disputes between de facto and married couples, while the second had been applied in de facto disputes or in situations where there was no matrimonial property legislation.

<sup>20</sup> paras 26–27.

<sup>21</sup> Sections 3–4 Civil Law Act Cap 25 as amended by the Civil Law (Amendment) Act No 9 of 2003 sections 2 and 3.

<sup>22</sup> See sections 58, 66 and 80 of the Land Act (Tonga) Cap 132.

<sup>23</sup> *Hayward v Giordani* [1983] 1 NZLR 140, *Pasi v Kamana* [1986] 1 NZLR 603, *Oliver v Bradley* [1987] 1 NZLR 586, *Gillies v Keogh* [1989] 2 NZLR 327.

<sup>24</sup> *Muschinski v Dodds* [1985] 160 CLR 583, *Baumgartner v Baumgartner* [1987] 164 CLR 137.

<sup>25</sup> *Murdoch v Murdoch* [1975] 1 SCR 423, *Rathwell v Rathwell* [1978] 2 SCR 436, *Pettikus v Becker* [1980] 2 SCR 834, *Sorochan v Sorochan* [1986] 2 SCR 38.

<sup>26</sup> *Grant v Edwards* [1986] 2 All ER 426 (obiter per Sir Nicholas Browne-Wilkinson at 439) and *Gillies v Keogh* [1989] 2 NZLR 327.

<sup>27</sup> *Pettit v Pettit* [1970] AC 777, *Gissing v Gissing* [1971] AC 886, *Grant v Edwards* [1986] 2 All ER 426, *Lloyds Bank v Rosset* [1990] 1 All ER 111 (HC).



Although the Supreme Court of Samoa is not bound to follow the precedents from other common law countries,<sup>28</sup> it is clear that the Chief Justice was reassured by the fact that:

There are now, in addition to the Canadian authorities . . . authorities at the highest level in England and Australia giving recognition to the existence of the restitutionary principles of unjust enrichment as part of the common laws of those countries.

However, the court went a step further. Recognising that Lord Denning's 'fair and reasonable' test had not been approved or adopted in other leading cases,<sup>29</sup> nevertheless the court held that doing what was 'fair, just and reasonable' was really no more than preventing unjust enrichment, and that the shared aim of all the various tests adopted to establish a constructive trust was to do what is fair, reasonable and just. Indeed the Chief Justice went on to say '(A) test which does not meet these criteria, should not qualify as a test in a legal system aimed at doing justice'.

In applying the combined test to the facts the court looked for enrichment in circumstances where there was a corresponding deprivation. Only if there was a deprivation—here on the part of the wife—would the enrichment be unjust. Similarly in applying the reasonable expectation test the court looked to evidence of sacrifice—by the wife, with corresponding detriment. Linked to this was the issue of contribution—especially to acquisition of disputed property—weighed against benefits received and evidence of any property arrangements made by the parties themselves. On the facts, the court ruled against the imposition of a constructive trust, but the formation of a principled but modified 'test' provides an interesting example of comparative judicial law-making.

A slightly different creative comparative approach was adopted in Vanuatu in the case of *Joli v Joli*.<sup>30</sup> Under the Constitution of the Republic of Vanuatu, it is stated that:

[T]he function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.<sup>31</sup>

Courts do not therefore have the liberty to avoid making a ruling, as had occurred in the Tongan case. Further, the opportunity for adopting a comparative approach had been previously endorsed by Chief Justice d'Imecourt in the case of *Timakata v Attorney-General* where he held:

It is clear, that the legal system of this nation is intrinsically linked to the system of those nations of the world as apply the Common Law system and the rule of law. Counted amongst those are virtually all the nations of the Commonwealth of nations, of which Vanuatu is a proud adherent. In real terms it means that, although the Courts of Vanuatu are not bound by any decisions of any of those courts, it can, nevertheless, allow itself to be

<sup>28</sup> See *L v L* [1994] WSCA 3 where Sir Robin Cooke stated 'in determining the common law applicable in Western Samoa (now Samoa), the courts of this country are free to draw on decisions in common law jurisdictions other than England itself . . . the Western Samoan Courts will select or evolve the solution which they adjudge to be most suitable for the society of Western Samoa.'

<sup>29</sup> Advocated in *Appleton v Appleton* [1965] 1 WLR 25, but rejected in *Gillies v Keogh* [1989] 2 NZLR 327 and *Baumgartner v Baumgartner* [1987] 164 CLR 137.

<sup>30</sup> [2003] VUSC 63, [2003] VUCA 27, [2004] VUSC 91.

<sup>31</sup> Article 47(1) read with Article 49(1) which confers civil and criminal jurisdiction on the court. This positive obligation on the court may have been influenced by principles of French law when the Constitution was drafted.



guided and influenced by decisions of Courts such as those of the UK, Canada, Australia, New Zealand, India, Papua New Guinea and others, within the Common law system. It can thus enrich its own jurisprudence by putting to good use and effect, those rules of law which have proved wise and successful and to have been well tested in other jurisdictions.<sup>32</sup>

It is therefore open to judges in Vanuatu to adopt a broad comparative approach when confronted by lacunae in the law or novel cases. In the *Joli* case however the Court of Appeal adopted a limited comparative approach by way of a detailed comparison of specific statutory rules and provisions. The legislation governing divorce is the Matrimonial Causes Act (Cap 192) passed by the Vanuatu parliament and in force from 15th September 1986. That Act however does not expressly revoke the divorce laws in force at independence. The relevant English laws were the Matrimonial Causes Act 1973, together with certain residual sections of the Matrimonial Causes Act 1965 and 1967, parts of the Matrimonial Proceedings and Property Act 1970 (Schedule 3 Matrimonial Causes Act 1973).<sup>33</sup> By implication and in line with the words ‘unless otherwise provided by parliament’ in Article 95 of the 1980 Constitution, provisions of the Vanuatu legislation which cover substantially the same ground as the legislation in force at independence will supplant the latter. So, for example, because the Matrimonial Causes Act (Cap 192) makes provision for the nullity of marriage and for the dissolution of marriage the former provisions found in the English legislation—or for that matter any French legislation—would no longer apply. Alongside the Matrimonial Causes Act (Cap 192), separate applicable law in force at independence and not yet repealed or replaced is the power of the court to determine property interests either under the Married Women’s Property Act 1882 (section 17) or under its inherent powers to determine property interests according to principles of law or equity. Further, the Constitution, which is the supreme source of law, provides that all persons are entitled to the fundamental rights and freedoms which are listed ‘without discrimination on the grounds of . . . sex’.<sup>34</sup> Taking an equitable and non-discriminatory approach, in the Supreme Court the judge (who was English) held that there was a rebuttable presumption that all the property under consideration was subject to joint beneficial ownership. The legal basis for this was the non-discrimination provisions of the Vanuatu Constitution and those of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to which Vanuatu is a signatory.<sup>35</sup> This line of reasoning was not accepted by the Court of Appeal, which was unable to agree with either the principles adopted in the Supreme Court or the presumption of joint or equal ownership of matrimonial property.

The court stated that:

The 1973 English Act, save in so far as its application has been overtaken by the provision of Cap 192, is a law which applies in Vanuatu in accordance with the provisions of Article 95(2), and will continue to do so until Parliament otherwise provides.

<sup>32</sup> In *Re the Constitution, Timakati v Attorney-General* [1992] VUSC 9, (1980–1994) Van LR 691.

<sup>33</sup> French laws were also in force but these were not raised in the case, despite the fact that the parties were French. The husband later raised a complaint about this.

<sup>34</sup> Article 5(1) read with Article 1(k).

<sup>35</sup> Ratified by Act No 3 of 1995, which makes the Convention part of the domestic law of Vanuatu.

The Court accepted that Part 1 of the Matrimonial Causes Act (UK)—which covers divorce, nullity and other matrimonial suits—has been overtaken by Parts I and II of the Vanuatu Act. The Court also thought that probably the broadly worded provisions of sections 14 and 15 regarding financial provisions for maintenance and alimony found in the Vanuatu Act replaced those found in Part II of the UK Act. The Vanuatu Act did not however ‘operate as a comprehensive code for all ancillary property matters that arise in connection with decrees of nullity or dissolution of the marriage’. What were not overtaken by the provision of Cap 192 were those sections of Part II of the UK Act which empowered a court to make property adjustment orders. These are found in sections 24 and 25 of the UK Act. Section 24 of the UK Act empowers a court either at the time of granting a decree of divorce, nullity or judicial separation or at any time thereafter: to order one spouse who has an interest either in possession or in reversion to transfer that interest to the other spouse (or any child of the family); or to order the settlement of any property by one spouse in favour of the other; or to vary any benefit to which one or other party is entitled under an ante or post-nuptial settlement. These orders can be made in combination or on their own. Section 25 sets out the criteria which the court should take into account in making any of the property orders under section 24.

While rejecting the presumption that matrimonial assets are beneficially owned jointly, the Court of Appeal did hold that where there was a dispute over either ownership or division of assets then this should be determined according to the ordinary principles of law and equity.<sup>36</sup> At a subsequent hearing in the Supreme Court the judge (this time a New Zealander) accepted the Court of Appeal’s view that in the circumstances the ‘matrimonial assets should be divided in a roughly equal fashion’.<sup>37</sup>

As demonstrated by the above examples, there are gaps in the law. Introduced law, which in many cases was left in place as an interim measure pending the enactment of domestic legislation by national parliaments, is inadequate, outdated and patchy. Consequently law reform often occurs on a piecemeal basis and is largely left to the judge. One of the interesting features of this judicial law-making or ‘law-patching’ is the range of other legal systems referred to in the two examples given. The following table illustrates this.

| Case                                       | Comparative Authorities  |
|--|--|
| <i>Elisara v Elisara</i><br>[1994] WSSC 14 | Matrimonial Property Act (NZ) 1976<br><br>Family Law Act (AUS) 1975<br>Matrimonial Proceedings and Property Act (UK) 1970 and<br>Matrimonial Causes Act (UK) 1973; Family Law Reform Act<br>1978 (Ontario); Canadian cases of <i>Murdoch v Murdoch</i> [1975],<br><i>Rathwell v Rathwell</i> [1978], <i>Pettkus v Becker</i> [1980]; <i>Sorochan v</i><br><i>Sorochan</i> [1986] |

<sup>36</sup> For an analysis and comment on the case see S Farran, ‘The *Joli* Way to Resolving Legal Problems: A New Vanuatu Approach?’ (2004) 1 *Journal of South Pacific Law* <<http://www.vanuatu.usp.ac.fj/japl>> accessed 14 September 2007.

<sup>37</sup> *Joli v Joli* [2004] VUSC 91.

(cont.)

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|--------------------------------------|---|
|                                      | English cases of <i>Gissing v Gissing</i> [1970], <i>Heseltine v Heseltine</i> [1971], <i>Falconer v Falconer</i> [1970], <i>Grant v Edwards</i> [1996]; New Zealand cases of <i>Avondale Printers v Haggie</i> [1979], <i>Hayward v Giodani</i> [1983], <i>Pasi v Kamna</i> [1986], <i>Oliver v Bradley</i> [1987], <i>Gillies v Keogh</i> [1989]; Australian cases of <i>Baumgartner v Baumgartner</i> [1987], <i>Muschinski v Dodds</i> [1985] |
| <i>Joli v Joli</i> [2003]<br>VUCA 27 | Married Women's Property Act (UK) 1882, Matrimonial Causes Act (UK) 1973, Matrimonial Proceedings and Property Act (UK) 1970; the English cases of <i>Watchel v Watchel</i> [1973], <i>Pettit v Pettit</i> [1969], <i>Kokosinski v Kokosinski</i> (1980); <i>Desai v Desai</i> (1982); the Australian case of <i>Baumgartner v Baumgartner</i> [1987]   |

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The role of the judge in shaping the law by adopting comparative approaches is neither novel nor limited to judges in the South Pacific region. However, the increasing availability of comparative material available in electronic format in a region where official law reports are scarce offers a golden opportunity to do so.<sup>38</sup> Nor need Pacific judges worry about translation in seeking assistance from the 'foreign' systems of Australia, Canada or New Zealand.<sup>39</sup> There may however be drawbacks. Under the influence of the common law the rule of precedent is prevalent throughout the region. Yet in these small jurisdictions decisions are often made by single judges—even at Supreme Court level—and on a case-by-case basis with little regard for the wider picture and with minimal likelihood of media outcry or academic criticism. Moreover, while equity may offer a route to achieving justice—especially if there is no apparent legal rule—the deployment of flexible equitable principles by judges from limited equity backgrounds may itself be a cause for concern, especially if the principles relied on are selected without any clear regard for the particular or peculiar facts and circumstances of the case they derive from. At the same time, however, regional judges adopting comparative approaches are doing valuable work: they are building bridges—albeit these are sometimes a little shaky—across the ocean to link the legal systems of the region. This process is, in turn, gradually creating a body of regional jurisprudence in which mutual principles are discernible. While there is no express acknowledgement of a Pacific *ius commune* emerging,<sup>40</sup> this may in fact be what is happening. This is of course a process that could, or perhaps should, be left to the legislatures of the region.

<sup>38</sup> Only Fiji and Samoa have official law reports at present. However electronic resources such as PacLII and AustLII are an invaluable means for accessing the law from elsewhere.

<sup>39</sup> A drawback highlighted by B Markesinis, 'Judge, Jurist and the Study and Use of Foreign Law' (1993) 109 LQR 622, 624.

<sup>40</sup> Compared to, for example, regional initiatives under the auspices of the Pacific Islands Forum or the Pacific Islands Secretariat.

In the cases under consideration not only were different comparative approaches adopted but also the relationship between the court as a law maker and the legislature was different. In the *Joli* case the Court of Appeal held that while it accepted the argument that Parliament may have considered that many of the country's citizens would not need to go to court to make arrangements concerning property on the termination of a marriage—presumably either because most people had very little property or because the most valuable property they would have would be land where rights are determined by customary land tenure, the court stated:

We think that Parliament would have been equally well aware of the fact that there will also be other citizens of the Republic, and expatriate members of the community, who in the event of a breakup of their marriage would need the law to regulate the division and settlement of property held by them at the time of their separation, and would not legislate in a way that left them out of account.

The court may have been wrong. The legislature of a country which was newly independent of colonial rule may not have been concerned by the possible future needs of expatriates, but much more concerned about putting in place laws which bore some resemblance to the everyday experience of indigenous people.

In the Tongan case of *Halapua v Tonga* however, the court clearly felt the matter should be left to Parliament, the judge stating:

We appreciate that different social and economic conditions in the Kingdom may mean that the English legislative provisions are not suitable. However, it is our recommendation that the legislature should consider whether there should be legislative provisions relating to the division of matrimonial property on the breakdown of the marriage, appropriate to the social and economic conditions in Tonga.

Such an approach recognized the uniqueness of the Tongan context, and while the gender discriminatory operation of Tongan land law was not mentioned, there is the impression that the (Tongan, male) judge was not going to challenge it by awarding the divorcee a property interest enforceable against her ex-husband. The court also indicated the caution required in adopting laws from elsewhere.

In the Samoan case, however, the court did not even consider it necessary to mention the need for Parliamentary intervention, believing as it did that the scope of its equitable jurisdiction was sufficient to address the issue. Whether this interpretation of its powers was correct is not under scrutiny here. If the matter was left to the legislature the outcome might certainly be different. Only title-bearers—who are usually male—can be elected representatives in Samoa and until recently there was a narrow franchise.<sup>41</sup> The fact that there has been very little family law reform in Samoa may be no coincidence.

Where the legislature does intervene, however, there is a further opportunity for comparative legal method. Indeed it has been suggested that 'comparative law ... is extremely useful for law reform in developing countries'<sup>42</sup> and there is express and implied scope under the Law Reform Commissions intended to be established in the region for this to happen, for example in the enabling legislation found in Solomon

<sup>41</sup> Only *matai* (chiefs or heads of extended families) could vote and it continues to be the case that only *matai* can sit in Parliament. Women may hold such titles but the majority are male.

<sup>42</sup> Zweigert and Kötz (n 1) 15. See also P de Cruz, *Comparative Law in a Changing World* (2nd edn, Cavendish, London 1999) 20.

Islands,<sup>43</sup> and Papua New Guinea.<sup>44</sup> There is no similar provision in the Fiji Law Reform Commission Act (Cap 26) nevertheless it is evident that recent reform in family law has been influenced by ideas, institutions and procedures from elsewhere.

#### IV. COMPARATIVE LAW AND THE LAW REFORMER

The reform of family law is low on the agenda of most Pacific Island states. Only Fiji Islands and Papua New Guinea have established Law Reform Commissions. However Fiji Islands has embarked on a programme of reform and undertook an extensive consultation exercise leading to the enactment of the Family Law Act in 2003.<sup>45</sup> Impetus for this commenced in the 1990s and was followed in 1996 by the appointment of a Law Reform Commissioner charged with responsibility for the Family Law Reference assisted by the Fiji Law Reform Commission. Three years of public consultations followed, resulting in the 'Family Report 1999: Making a Difference to Families in Fiji'. A Deputy Chief Justice of the Australian Family Court was appointed to draft a Bill. Adverse feedback to Fiji's CEDAW report in 2002 provided added impetus from the perspective of gender inequalities experienced under the existing system. In the final stages consultants were seconded under the Australian/Fiji Law and Justice Sector Programme and under arrangements with the Family Court of Western Australia to provide in-country training. The result is an Act which closely follows that of Australia.<sup>46</sup>

The Fiji initiative was funded by Australia and New Zealand. It introduces far-reaching changes in both procedural and substantive family law.<sup>47</sup> It includes new rules of procedure for dedicated Family Courts, the establishment of a counselling service and the acquisition of a range of sophisticated technology—such as audio visual facilities and computerized case management systems, appropriate physical infrastructure and staff with specialist skills. Law reform of this magnitude cannot occur in the region without external funding and expert assistance. Indeed in opening the new Family Court the (then) Vice-President Ratu Joni thanked the Australian and New Zealand governments, saying that 'without their advice and technical assistance

<sup>43</sup> Law Reform Commission Act Cap 15 section 6(g) indicates that the commission has the power 'to obtain information on the laws and legal systems of other countries as a means of providing ideas for the reform and development of the law of Solomon Islands'. The Samoa Law Reform Commission Act 2002 is less specific, conferring on the Commission the power 'To conduct or sponsor such studies and research as it thinks expedient for the proper discharge of its functions', section 7(b).

<sup>44</sup> Law Reform Commission Act 1975 s11 (g) 'obtain information on the laws and legal systems of other countries as a means of providing ideas for the reform and development of the law of Papua New Guinea'.

<sup>45</sup> For further detail on the stages leading up to the law reform see I Jalal, 'A woman's quest for Equality' *The Fiji Times* (25 November 2003) [http://rrrt.org/page.asp?active\\_page\\_id=142](http://rrrt.org/page.asp?active_page_id=142), accessed 20 September 2007.

<sup>46</sup> See the address to the Fiji Law Society by Justice Stephen Thackray July 2006, in which he states 'your new Act adopts the most important provisions of the Australian *Family Law Act* 1975. ... One thing that is very similar to our law is the method Fiji has adopted to deal with division of property following marriage breakdown'. Author's copy.

<sup>47</sup> Including new rules for the division of matrimonial property on divorce which incorporate more guidelines for the exercise of court discretion and the possibility of taking into account non-financial contribution.

particularly in relation to how things are done would not have made this day possible.<sup>48</sup> Therein, however, lies the question. Knowledge and advice of how things are 'done' in New Zealand or Australia is not necessarily an infallible recipe for success in Fiji. As pointed out by Imrana Jalal:

Whether the Act lives up to its promise now ultimately depends on the political will of those who have the power to make the Act a living instrument; and how the civil service responds to it. This in turn depends on the financial and human resources that are allocated to the new law to implement it. Most importantly the civil service needs to understand clearly the regime proposed by the Act.<sup>49</sup>

Family law, particularly its procedures, is not without its critics in the parent legal system.<sup>50</sup> It has been pointed out that alternative dispute resolution may operate against the interests of vulnerable women and children, and that emphasis on out-of-court procedures such as counselling, negotiating and welfare or social reports can cause delays which have negative consequences.<sup>51</sup> This is not the place to consider the strengths and weaknesses of Australian or New Zealand family law—particularly as experienced by minority communities or indigenous people in those countries, although such an exercise might be sound pre-requisite for transplant or adoption.

The Fiji Family Law Act is ambitious in its aims. Its passage has attracted considerable controversy and debate.<sup>52</sup> It is not universally popular and still has its detractors.<sup>53</sup> Certainly there is a danger that the machinery and resources introduced to support the new law will prove costly to implement and maintain, and the concepts and principles which underpin the new substantive law may be unfamiliar in the context in which they are expected to operate. The Act has taken two years to put in place and there is still a shortage of personnel to take on the tasks envisaged by the new court system and the services offered under the Act, a situation which is now aggravated by the current political situation in Fiji and the deteriorating relationship between the governments of Fiji Islands, Australia and New Zealand.<sup>54</sup> Moreover, in the two years since coming in to force there have been very few published law reports, so it is difficult to know how the new rules and procedures are working or whether the new principles of family law are being applied consistently. It remains to be seen therefore whether this contemporary transplant survives its journey and whether it will really

<sup>48</sup> 'Vice President Ratu Joni opens new Family Law Court Nov 2, 2005, [http://www.fiji.gov.fj/publish/printer\\_5678.shtml](http://www.fiji.gov.fj/publish/printer_5678.shtml) accessed 20 September 2007.

<sup>49</sup> 'I Jalal, 'State on Track with new Act' *The Fiji Times* (27 July 2004) <[http://rrrt.org/page.asp?active\\_page\\_id=172](http://rrrt.org/page.asp?active_page_id=172)> accessed 20 September 2007. See also Jalal's personal mission statement in 'Why Fiji needs a Family Law Bill' *The Fiji Times* (18 November 2003).

<sup>50</sup> See for example R Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' [2000] *Melbourne University Law Review* 29.

<sup>51</sup> See for example, R Field, 'Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution' (2005) *QUT Law and Justice Journal* 2.

<sup>52</sup> Especially from church representatives but also from the more conservative sectors of Fiji society.

<sup>53</sup> As ascertained by the author in conversation with Justice Mere Pulea, Judge of the Family Court, Fiji, July 2007.

<sup>54</sup> Fiji has a history of political coups, the most recent being in late 2006. At the time of writing the physical location of the family court in the capital Suva, was shared with military personnel and vehicles. It is perhaps pertinent to recall the words of C E McGuire: 'The easy migration of ideas and the borrowed refinement of legal processes thrive best in the calmer years' in 'The Legislator's Interest in Comparative Legal Studies' (1932) *Tulane Law Review* 171.

'allow women and children, especially the poor and marginalised, better access to justice'.<sup>55</sup>

#### V. CONCLUSION

The jurisdictions of the South Pacific region do not neatly fit into the categories or groupings often used by comparativists. Certainly there is a strong influence of common law, but can it really be claimed that this is the 'parent' legal system where the greater portion of that law was imposed under colonial rule? Further, more recent law has been influenced by developments in second generation or 'offspring' legal systems such as New Zealand and Australia. At the same time, given that almost all the Pacific Island States have plural systems of law in which the dynamics between the various sources of law are in a constant state of flux, it cannot be claimed that these are customary law systems, albeit customary law and customary practices are relevant to the legal history, tradition and culture of these countries.<sup>56</sup>

The example of the Pacific island countries suggests that too little attention has been paid by comparativists to emerging legal systems, whether these are adult offspring emerging from parent legal families or newly independent states emerging from the legal domination of former rulers.<sup>57</sup> New forms of mixed legal systems need to be recognised and valued for the diverse legal approaches they adopt.<sup>58</sup> At the same time imbalances of power in legal innovation need to be appreciated.

As has long been advocated, comparative law can be a valuable tool for legal reform whether employed by the legislator, the judge or the academic commentator. There is however a danger is assuming that the consequence or outcome of such an exercise will always be beneficial.<sup>59</sup> In the enthusiasm for globalisation, universalism and harmonisation, such caution may not be appealing. There may be assumptions that models from 'superior' legal systems must be good for developing countries and perhaps a reluctance to face up to differences rather than seize on similarities.

However, law in theory may be very different from law in practice. In those countries especially where religious or customary law plays an important part, the introduction of legal ideas, rules and institutions from elsewhere are likely to be translated and modified more than might be the case where the recipient legal system and environment is less distinct from that of the originating one. Ideologies, especially in those countries emerging from colonial rule, may be different. Considerations of local context cannot be ignored. Family, or personal law, may present particular

<sup>55</sup> V Buadromo 'FWRM Congratulates Government on Establishment of Family Court' Press Release 2 November 2005, Fiji government <[http://www.fiji.gov.fj/publish/page\\_5681.shtml](http://www.fiji.gov.fj/publish/page_5681.shtml)> accessed 27 July 2007.

<sup>56</sup> These defining criteria of a legal system are discussed by de Cruz (n 33) Chapter 2.

<sup>57</sup> Indeed the relegation of such societies to 'legal ethnology' rather than comparative law has stigmatised them as not quite worthy of comparative study.

<sup>58</sup> See for example, the interesting account of family law in Egypt by L Abu-Odeh 'Modernising Muslim Family Law: The Case of Egypt (2004) Oxford U Comparative L Forum 3 <<http://ouclf.iuscomp.org>> accessed 1 November 2004.

<sup>59</sup> See for example reservations expressed by O Kahn-Freund, 'On the uses and misuses of Comparative Law' (1974) 37 *Modern Law Review* 1 and A Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79 and B Markesinis, 'The Destructive and Constructive Role of the Comparative Lawyer' (1993) *RabelZ* 438, 442–443.



difficulties.<sup>60</sup> For example, it is no good advocating equal property rights between spouses if women are not entitled to hold land or if land held under customary tenure cannot be alienated or subdivided or held by non-indigenous people, or if ministerial permission is required to approve transfers of title. In the context of matrimonial property there are also other contextual considerations such as changes in the nature of property acquired, the changing nature of 'the family', the demographic impact on the roles of individuals within the family and the changing relationship of spouses in respect of each other. Similarly, limited judicial training and exposure to continuing professional development and a wide range of legal resources may leave lawyers and judges, especially magistrates unprepared for legal innovation.

In many developed countries family law has undergone dramatic and often radical reforms. In the Pacific, with the exception of Fiji, it has not. In part the reason is not just political apathy but also because the social context is very different. This is a region where most of the population are still church-goers; it is deeply Christian; homosexuality is illegal; adultery, while not a crime, attracts awards of damages in some jurisdictions, and divorce, although legal is still not socially accepted in many communities. The comparativist—whether a judge, academic or legal draftsman—needs to tread with care. Indeed in the field of law reform, not only has the comparativist been given the greatest freedom,<sup>61</sup> and requires courage and time for reflection,<sup>62</sup> he or she also has considerable responsibility: the scalpel of the law reformer is not to be wielded lightly.

<sup>60</sup> See D Bradley, 'Convergence in Family Law: Mirrors, Transplants and Political Economy' (2001) Oxford U Comparative L Forum 2 <http://ouclf.iuscomp.org/articles/bradley> accessed 8 September 2004.

<sup>61</sup> Misquoting O Kahn Freund who stated: '(O)n the professor of comparative law the gods have bestowed the most dangerous of all their gifts, the gift of freedom', 'Comparative Law as an Academic Subject' (1966) 82 LQR 40, 41.

<sup>62</sup> As advocated by Markesinis (n 45) 447.